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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. NOLAN LEE HADDOCK, Defendant and Appellant.	B215293 (Los Angeles County Super. Ct. No. MA039729)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Modified and affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II, Deputy Attorney General, Steven E. Mercer, Deputy Attorney General, for Plaintiff and Respondent.

Nolan Lee Haddock challenges his conviction of attempted voluntary manslaughter. He claims the trial court erred in concluding that evidence of the victim's martial arts experience and prior threats against appellant were admissible only as character evidence within the meaning of Evidence Code section 1103,[1] a ruling which opened the door for evidence about appellant's **c**haracter. He claims the court abused its discretion in allowing evidence about appellant's prior acts which were remote in time, and that the court abused its discretion in refusing to strike his prior convictions based on their remoteness.[2] We order the abstract of judgment corrected, and in all other respects, affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On September 2, 2007, appellant was living at Robert Deathrage's house in Palmdale. He was at home when the victim, Phillip Preston Mills, arrived. Mills had ingested methamphetamine and other narcotics before he arrived at the house. Mills's friend, Tim (or Jim) also was present. The three men went into appellant's room, where appellant and Mills got into an argument. Appellant yelled at Mills and told him to get out of the house; Mills yelled back and started to walk out of

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[1] All statutory references are to the Evidence Code unless otherwise indicated.

[2] Appellant also claimed the jury was misled by the title on the written version of CALJIC No. 2.50.01 that was given to the jury, as contained in the clerk's transcript. He raised no objection to the modified text of the instruction, only to the title. Upon learning of this contention, the trial court informed respondent that the titles of the instructions were not visible on the written instructions given to the jury. On motion by respondent, we ordered the trial court to conduct a hearing and prepare a settled statement addressing the jury instructions or any other omissions or errors that may appear in the appellate record. The trial court did so, and after consideration of the transcript of that hearing, we are satisfied that the title of the instruction was cut off of the written instruction given to the jury, then reattached when the clerk's transcript was prepared for this appeal. There was no error in the written version of CALJIC No. 2.50.01 given to the jury.

the room. As Mills neared the door, appellant stabbed him in the left upper chest with a hook-shaped sickle. The sickle went deep into Mills' body, and appellant had to wiggle it back and forth to get it out. Mills fled into the living room, saying to appellant, "'You almost killed me.'" Appellant responded, "'I hope you die, mother fucker.'"

Mills ran out of the house and over a fence. He flagged down a car and was taken to a hospital. His lung had been punctured, and he was hospitalized for several days.

Mills was first interviewed at the hospital by Los Angeles County Sheriff's Deputy Michael Marino. He told Marino he had been attacked by three men while he was walking down the street.

Detective Jeffrey Kurran also interviewed Mills at the hospital. Mills described the incident and identified appellant as the perpetrator. He explained he had lied to Deputy Marino because he wanted to kill appellant when he was released from the hospital.

Appellant was arrested two months later by Sheriff's Detective Steven Saylor. He told Saylor that Mills was an abuser who pushed him and other people around. He stated that on the night of the incident, he got into an argument with Mills, that Mills pushed him onto his bed, at which point appellant grabbed a sickle from the work bench in his room and stabbed Mills.

Appellant was charged in count 1 with attempted murder, with an allegation that he personally used a deadly weapon and inflicted great bodily injury on the victim. He was charged in count 2 with assault with a deadly weapon, with an allegation that he personally inflicted great bodily injury. It also was alleged that he had two serious or violent felony convictions subject to the "Three Strikes" law. The jury found appellant guilty of the lesser included offense of attempted voluntary manslaughter on count 1, guilty as charged on count 2, and found the weapon use and great bodily injury allegations to be true. The court found the prior conviction allegations to be true. He was sentenced to 25 years to life on

count 1, plus 10 years for the two serious felony prior convictions. His sentence on count 2 was stayed. This is a timely appeal from the judgment of conviction.

DISCUSSION

I

Appellant made a pretrial section 402 motion seeking to introduce evidence in the form of witness testimony that on several occasions before the incident, Mills made statements threatening to kill appellant. Defense counsel wanted to bring in this evidence under section 1101, subdivision (b), as evidence of a crime or other wrong to prove appellant's state of mind, in order to establish that he acted in self-defense.

The court disagreed with counsel's theory, and ruled the evidence admissible only under section 1103. Admission of this evidence under section 1103, subdivision (a)[3] opened the door for the prosecution to present evidence of *appellant's* specific instances of conduct to show he had a character for violence under section 1103, subdivision (b).[4] This would not have been permitted if the

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[3] Section 1103, subdivision (a) provides: "In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character."

[4] Section 1103, subdivision (b) provides: "In a criminal action, evidence of the defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a)."

evidence had been admitted under section 1101, as appellant had sought to do. Appellant claims this was error.

Section 1101, subdivision (a) provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Section 1101, subdivision (b) codifies the basic rule that evidence of a person's conduct is admissible when offered not to prove a person's propensity to commit such an act, but for some other purpose: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." Stated in its simplest terms, evidence of conduct offered to prove a fact such as state of mind or something else described in subdivision (b) is not character evidence offered to prove a person's propensity, which is inadmissible under subdivision (a). Appellant argued that Mills's threats against him were admissible under section 1101, subdivision (b) in order to prove appellant's state of mind at the time of the attack.

The killing of another person in self-defense is justifiable when the person who does the killing actually and reasonably believes in the need to defend against imminent danger of death or great bodily injury. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) "If the belief subjectively exists but is objectively unreasonable, there is 'imperfect self-defense,' i.e., 'the defendant is deemed to have acted without malice and cannot be convicted of murder,' but can be convicted of manslaughter. (*In re Christian S.* (1994) 7 Cal.4th 768, 783.)" (13 Cal.4th at p. 1082.) Where there is evidence that a defendant may have acted in the actual belief in the need for self-defense, the prosecution has the burden to prove beyond a reasonable doubt that a defendant was not acting in self-defense or

in imperfect self-defense. (*In re Walker* (2007) 147 Cal.App.4th 533, 552; *People v. Pineiro* (1982) 129 Cal.App.3d 915, 920.)

Appellant sought to present witnesses who could testify that they had observed Mills threatening appellant with violence, as circumstantial evidence that when Mills pushed appellant onto the bed during their argument, appellant actually and reasonably believed that he was in imminent danger of death or great bodily injury.

"'Common sense and experience tell us that it is reasonable for a person threatened by another to be on heightened alert upon encountering that threatener, and to reasonably take [the threat] into account in deciding the necessity for, and the amount of, defensive action, in response to any act on the part of the threatener reasonably appearing to be calculated to carry out that threat.'" (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065.) A defendant charged with assaultive crimes who claims self-defense therefore may present evidence that the alleged victim had previously threatened him, and also may present evidence of third party threats if there is also evidence that the defendant reasonably associated the victim with those threats. (*Id*. p. 1060.) The *Minifie* court relied on *People v. Davis* (1965) 63Cal.2d 648. In *Davis*, the defendant was precluded from presenting evidence of the victim's acts of violence toward third parties on the issue of self-defense. The court held that because the defendant was not attempting to prove the victim's character for violence, but instead attempting to prove his own frame of mind, "[h]e was entitled to corroborate his testimony that he was in fear for his life by proving the reasonableness of such fear. The immediate issue was not the truth of the matters reported to him but whether he had cause to believe them and, if so, whether it was reasonable for him to predicate a fear thereon." (63 Cal.2d at p. 656.)

Appellant in this case intended to use the victim's threats of violence against him for the same purpose—as proof of his own frame of mind. This is not propensity evidence, which would be admissible under section 1103, but evidence

of conduct to prove the fact that appellant was in fear for his life, admissible under section 1101, subdivision (b). In this instance, the evidence that Mills had in the past threatened violence against appellant and that appellant was aware of the threats, supported the inference that when Mills pushed appellant on this occasion, appellant had a reason to fear Mills would carry out his threat. That is a factor the jury could consider in evaluating the appellant's state of mind, but it was not a basis to preclude appellant from presenting the evidence under section 1101, subdivision (b). That left appellant with no choice but to proceed under section 1103, subdivision (a) in order to present his claim of self-defense, but also opened the door for the prosecution to present rebuttal evidence of appellant's specific instances of conduct under section 1103, subdivision (b).

The question is whether this error was prejudicial. Error in the admission of evidence does not require reversal of a judgment unless the error resulted in a miscarriage of justice. Under article VI, section 13 of the California Constitution, a judgment shall not be reversed on the ground of improper admission of evidence "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Whether there has been a miscarriage of justice is evaluated under the "reasonably probable" standard of *People v. Watson* (1956) 46 Cal.2d 818: whether, after an examination of the cause, including the evidence, the reviewing court is of the opinion "that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Id.* at p. 836.) That standard is not met in this case.

The evidence of the incident giving rise to the charges was that Mills, under the influence of methamphetamine and other narcotics, went into appellant's room, and the two men began to argue. Appellant told Mills to "Shut the fuck up. Get the fuck out of here." Mills replied, "Fuck you." Appellant told Detective Saylor that Mills then pushed him onto the bed. At that point, appellant grabbed a sickle which was on the work bench in his room and stabbed Mills with it. There

was no evidence that Mills was armed, or that he did anything more than push appellant onto the bed.

Under these facts, it is not reasonably probable that a jury would have found appellant acted in pure self-defense in stabbing Mills with a sickle. Mills's prior threats against appellant, and Mills's prior acts of violence against others, support the inference that appellant actually but unreasonably feared imminent danger of death or great bodily injury when Mills pushed him onto the bed after the two exchanged angry words. Apparently the jury agreed, because it returned a verdict that appellant was guilty of attempted voluntary manslaughter, rather than attempted murder. But this evidence does not support the conclusion that such fear was reasonable under an objective standard. Mills was unarmed at the time. Even if he was known to be violent, highly skilled in martial arts, and angry at appellant, his actions on this occasion do not reasonably support the belief that appellant was in imminent danger of death or great bodily injury; all Mills did was yell back at appellant and push him onto the bed. It is difficult to see how a reasonable juror could have returned a verdict of not guilty based on pure self-defense under these facts.

Based on the court's erroneous ruling, the prosecution was permitted to present evidence of appellant's violent character in rebuttal to appellant's evidence of Mills's threats and violent character. (§ 1103, subds. (a) & (b).) This included evidence of appellant's three prior convictions: involuntary manslaughter in 1977, and assault with a deadly weapon in 1981 and 1984. These prior convictions were no more inflammatory than the present charges, and as we have explained, they did not preclude the jury from crediting appellant's theory of imperfect self-defense.

The prosecution also called Judith Ryan, appellant's former girlfriend. Ms. Ryan lived with appellant for approximately two years in the mid-1970's, and last saw appellant in 1979 or 1980. She testified that appellant "Slapped the bejesus out of me." After that, she ended their relationship. She also testified that

appellant did not really have a bad temper, but "when he does some serious drinking, do not push his buttons." This evidence, while remote in time, apparently resulted in no harm to appellant's defense.

Over defense objection, the prosecution also posed a hypothetical to Ms. Ryan: "If a young person, say, a person around 21 years old came into Mr. Haddock's room, told him to 'Fuck you,' basically, pushed his buttons, in your opinion, how would Mr. Haddock react to that?" She replied, "The gentleman would pick up his teeth." She was then asked, "And what about if a young person told Nolan that he was going to kill Nolan and put his hands on Nolan's body?" She answered, "Like I said, he picks up his teeth." We agree with appellant that the court abused its discretion in allowing this lay opinion.

Evidence Code section 800 provides that if a witness is not testifying as an expert, his or her opinion is limited to an opinion that is rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony. Ms. Ryan last saw appellant in 1979 or 1980, when he was in his early thirties. This incident occurred in 2007, when appellant was 60 years old. There is no rational basis for her opinion about how he would behave in a hypothetical situation 27 or 28 years after her last contact with him. This evidence should not have been admitted. But this evidence apparently caused no more harm than the evidence of his prior convictions, since the jury credited appellant's assertion of imperfect self-defense.

We also note that appellant took full advantage of section 1103, subdivision (a). In addition to the evidence of Mills's prior threats of violence against him, appellant also elicited testimony from Mills about his 16 years of martial arts training, about an incident where he punched his grandfather in the arm and put his mother in a chokehold, and about his beating up a man named Sergio Rodriguez who was much bigger than Mills. Mills's father testified on appellant's behalf that he had enrolled Mills in martial arts classes when he was a boy because of Mills's "mental condition. I figured it would help him to get some discipline

and learn how to control, you know, his problem." Mills's father removed the boy from the classes because the child "had a couple incidents at school where he tore up the computer room in a classroom, [and] threatened the life of his teacher and the principal at his school." Mills's father did not feel it made "any difference whether or not I pulled him out or not. He continued with his violent streak from then on." This damaging character evidence of the victim certainly minimized any harm appellant may have suffered from character evidence offered against him.

Viewing the record as a whole, we conclude there was no reasonable possibility appellant would have obtained a better result in the absence of the trial court's errors.

II

At a bifurcated proceeding, the trial court found that appellant had suffered two prior strike convictions: a December 1977 conviction for voluntary manslaughter in violation of Penal Code section 192.1, and a June 1984 conviction for assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1). Prior to sentencing, appellant moved to strike these priors pursuant to Penal Code section 1385. He claims the court abused its discretion when it refused to strike his prior convictions.

In cases charged under the Three Strikes law, a trial court has the discretion to strike a prior felony conviction allegation in furtherance of justice, pursuant to Penal Code section 1385, subdivision (a). (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530.) In ruling whether to strike or vacate a prior serious or violent felony conviction allegation or finding under the Three Strikes law, or in reviewing such a ruling, "the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted

of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Appellant argued that both prior convictions were more than 20 years old, and both had occurred while he was suffering from posttraumatic stress disorder following his military service in Vietnam. He called a witness who worked with veterans suffering from posttraumatic stress disorder, who testified to the way in which the disorder would manifest in a combat veteran who is attacked or feels endangered. Appellant's ex-wife testified that appellant changed when he came back from Vietnam; he "turned into sort of a recluse."

The prosecution urged the lengthy and serious nature of appellant's criminal history. His 1977 prior conviction for voluntary manslaughter involved stabbing someone to death, and his 1984 prior for assault with a deadly weapon also involved a stabbing. He was convicted of another assault with a deadly weapon in 1983, again for stabbing a person. He had three felony convictions for felon in possession of a firearm in 1988, 1992, and 1993, and misdemeanor convictions in 1998 and 2002.

The court found appellant did not fall outside the spirit of the Three Strikes law. The court was concerned about the extent of appellant's criminal history, and the fact that in addition to the convictions for violent crimes, several of the others involved possession of a weapon, raising the potential for violence. The court noted appellant continued to possess weapons, including a collection of sickles, and thus continued to present the potential for violence.

Given appellant's repeated violent assaults over a period of 30 years, and his unlawful possession of weapons during that period, we find no abuse of discretion in the court's decision not to strike either of his strike priors. The nature and circumstances of appellant's present crime and his criminal history do not demonstrate that he is outside the spirit of the Three Strikes law.

III

Respondent claims, and appellant agrees, that the abstract of judgment improperly states that appellant was convicted of attempted murder, when it should state he was found guilty of attempted voluntary manslaughter. We order the abstract of judgment be corrected to state that appellant was convicted in count 1 of attempted voluntary manslaughter. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 186-187 [Court of Appeal may order trial court to correct clerical error in abstract of judgment on its own motion or upon application of the parties].)

DISPOSITION

The judgment is modified to reflect appellant's conviction of attempted voluntary manslaughter, and affirmed as modified. The trial court is directed to prepare an amended abstract of judgment which reflects this change and to furnish the amended abstract of judgment to the Department of Corrections.

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EPSTEIN, P.J.

We concur:

WILLHITE, J.

MANELLA, J.